THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no J 1849/2019

In the matter between

DEMAWUSA Applicant

MEMBERS OF DEMAWUSA Second and further Applicants

And

CITY OF JOHANNESBURG Respondent

Heard: 24 October 2019

Delivered: 7 November 2019

JUDGMENT

VAN NIEKERK J

[1] This is an urgent application in which the applicants seek final interdictory relief against the respondent. They allege that the respondent has suspended the second to further applicants (the employees) unlawfully, and that the respondent has unlawfully made deductions from their salaries.

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[2] The employees are all employed by the respondent as basic ambulance assistants, intermediate life support and fire fighters. The employees' primary duties entail responding to emergency calls from the public, attending to emergency scenes and providing immediate treatment to sustain patients while they are transported to hospital. The first applicant, the union, has been in dispute with the respondent for some months. This dispute escalated to what the respondent contends is an unprotected strike that occurred during July 2019. On 26 July 2019, the court granted an interim interdict against the applicants, interdicting them from participation in an unprotected strike. On the return date, 24 October 2019, confirmation of the rule *nisi* was opposed, and judgment was reserved. The present application arises from what the respondent considers to be open defiance of the interim interdict. It commenced a process to suspend the employees whom it considered to have participated in an unprotected strike, pending further investigation into their conduct. The respondent issued notices of suspension to the employees, on account of a refusal to perform duties allocated to them. Further, the respondent took the view that given the employees' refusal to perform their duties, it was not obliged to pay them certain allowances contingent on their presence at work. The applicants on the other hand contend that this constitutes an unauthorised deduction from remuneration.

[3] The applicants aver that this court has jurisdiction to entertain their claim since it is a court of law and equity, and its powers in terms of s158 of the LRA to grant interdicts and other orders. In paragraph 19 of the founding affidavit the applicants state the following:

> 19. In relation to suspension, it should be noted that the Employees do not seek to deal with the fairness of their suspensions and deductions of their salaries, all what the Employees require is that the lawfulness of the suspensions and deductions to their salaries be determined.

[4] The basis on which the applicants contend that the suspensions and deductions respectively are unlawful are apparent from the founding affidavit. In respect of what are contended to be unlawful suspensions, the applicants aver that the

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respondent has failed to comply with clause 16.1 of the disciplinary procedure collective agreement (the collective agreement) in a number of respects. The collective agreement referred to is the subject of circular 01/2018, and was concluded under the auspices of the bargaining council. It is not in dispute that the collective agreement binds the parties to these proceedings. Clause 16 of the collective agreement provides for the precautionary suspension of employees pending a disciplinary hearing, subject to certain to conditions that relate in the main to procedure. It is these conditions that the respondent is alleged to have breached, that being the basis for the allegation of unlawfulness made by the applicants.

[5] In so far as the deductions from wages is concerned, the employees contend that the respondent has breached s 34 of the Basic Conditions of Employment Act (BCEA), in that deductions were made from their remuneration without their consent. In neither instance do the employees contend for any breach of their employment contracts - their claims are predicated on an alleged breach by the respondent of clause 16 of the collective agreement and s 34 of the BCEA respectively.

[6] In the answering affidavit, the respondent raised a jurisdictional point, the only issue canvassed at the hearing of the application. The respondent contends that the court has no jurisdiction to entertain the application, since the LRA is not concerned with unlawful suspensions from employment and unlawful deductions from remuneration. The respondent relies on the judgment of the constitutional Court in *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (2016) 37 *ILJ* 564 (CC). That case concerned a claim by the appellants that their dismissals by the respondent were unlawful and invalid, because their employer had not complied with time periods established by s189A of the LRA prior to issuing notices of termination of employment, with the consequence that their termination of employment was premature. The majority of the Constitutional Court rejected this contention, on the basis that this court has no jurisdiction to determine the lawfulness of a dismissal. The court observed

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that there was no provision in the LRA in terms of which an order could be sought declaring a dismissal unlawful or invalid. At paragraph 106 of the judgment, the court said the following:

> [106] Section 189A falls within chapter VIII of the LRA. That is the chapter that deals with unfair dismissals. It's heading is: 'Unfair dismissal and unfair labour practice'. Under the heading appears an indication of which sections fall under the chapter…
>
> Conspicuous by its absence here is a para (c) to the effect that every employee has a right not to be dismissed unlawfully. If this right had been provided for in s 185 or anywhere else in the LRA, it would have enabled an employee who showed that she had been dismissed unlawfully to ask for an order declaring her dismissal invalid. Since a finding that a dismissal is unlawful would be foundational to a declaratory order that the dismissal is invalid, the absence of a provision in the LRA for the right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal is a consequence of a dismissal effected in breach of a provision of the LRA…

And further at paragraph [107]:

> This indication is reinforced when one has regard to the definition of "dismissal" in section 186 (1) … Once again the absence of any reference to an unlawful dismissal is telling. It suggests that, if the dismissed employee wishes to raise the unlawfulness of their dismissal, they must categorise it as unfair if they are to obtain relief under the LRA.

[7] The effect of this judgment is that when an applicant alleges that a dismissal is unlawful (as opposed to unfair), that applicant has no remedy under the LRA and this court has no jurisdiction to make any determination of unlawfulness. If a remedy is sought under the LRA, the applicant must categorise the alleged unlawfulness as unfairness.

[8] By extension, the same principle applies to any precautionary suspension from employment. Section 185 of the LRA is concerned with unfair dismissals and

unfair labour practices. Section 186 (2) defines an unfair labour practice. In paragraph (b), the Act provides that the unfair suspension of an employee or any other unfair disciplinary action short of dismissal, constitutes an unfair labour practice. It follows that what was good for a termination of employment in *Edcon* is good for an unfair labour practice in the present instance. In other words, the lawfulness of any suspension is not a matter regulated by the LRA, and any remedy under that Act must be sought on the basis of fairness.

[9] It is well-established that jurisdiction is to be determined from the pleadings. In motion proceedings, the pleadings comprise the affidavits filed by the parties. As I have recorded above, in the founding affidavit, the applicants specifically disavow any reliance on fairness as the basis of their cause of action. They clearly frame their claim on the basis of what they allege to be an unlawful suspension, and an unlawful deduction from remuneration, on the basis respectively of the breach of the collective agreement and s 34 of the BCEA.

[10] Counsel for the applicant sought to distinguish the *Edcon* judgment by submitting that in *Edcon*, the court was concerned with an alleged breach of the LRA, and in particular, the time periods relevant to the giving of notice of termination of employment established by s 189A. In the present instance, as I understood the argument, the applicants rely on unlawfulness outside of the LRA, in the form of a breach of a collective agreement, and that they are entitled in those circumstances to seek a remedy in this court consequent on that breach.

[11] I fail to appreciate how the source of the alleged unlawfulness affects the principle established in *Edcon*. The fact that the alleged breach is not one of any provision of the LRA but some other statute, regulatory measure or collective agreement, makes no difference. The cause of action remains one of unlawfulness, whatever the nature of the alleged breach or unlawful conduct by the employer might be. In any event, the argument is met by the *Edcon* judgment, in so far as it holds that where the true nature of a dispute is one that

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concerns the breach of an obligation established by the LRA, a remedy must be sought in terms of that Act and in accordance with the dispute resolution mechanisms established by the LRA. At paragraph [137] of the judgment, the court said the following:

> [137] The second basis for my conclusion is that the applicant's appeal should be dismissed is a principle that, for convenience, I call 'LRA remedy for an LRA breach'. The principle is that, if a litigant's cause of action is a breach of an obligation provided for in the LRA, the litigant as a general rule, should seek a remedy in the LRA. It cannot go outside of the LRA and invoke the common law for a remedy. A cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanisms of the LRA to obtain a remedy provided for in the LRA.

[12] The basis of the applicants' claim, as I have noted, is that the respondent has breached the terms of the collective agreement that regulates disciplinary procedures in the workplace. Section 24 of the LRA regulates disputes about collective agreements. Section 24 (1) provides that every collective agreement must establish a procedure to resolve any dispute about the interpretation or application of the agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation, and if the dispute remains unresolved, to resolve it through arbitration. In so far as the dispute between the parties concerning the employees' suspension is based on the respondent's alleged breach of the collective agreement, the dispute is one that is an "LRA dispute" which falls to be resolved under the dispute resolution provisions of the LRA. Indeed, the collective agreement gives effect to s 24. Clause 20 reads as follows:

> Disputes about the interpretation and application of this collective agreement shall be dealt with in terms of the dispute resolution mechanisms provided for in the Main Collective Agreement.

[13] Consistent with s 24 of the LRA, the main agreement provides for the resolution

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of such disputes by arbitration. Given that the dispute between the parties is one that must be arbitrated, this court has no jurisdiction to entertain it. Section 157 (5) provides:

> (5) Except as provided for in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act or any employment law requires the dispute to be resolved through arbitration.

[14] For these reasons, this court has no jurisdiction to entertain the applicants' claim of an unlawful suspension. Counsel for the applicants pointed out that this court had previously granted such orders, and referred to a number of judgments were this is indeed so. However, the fact remains that the exclusion of this court's jurisdiction in relation to dismissals and unfair labour practices that are alleged to be unlawful has now been the subject of a definitive judgment by the highest court. Whatever uncertainty may previously have existed; the law is now clear.

[15] Turning next to the applicants' claim of unlawful deductions, that claim must suffer a similar fate. The applicant's base their claim on a breach of s 34 of the BCEA. That Act establishes its own mechanism for enforcement, one that requires (in most instances) that a complaint be lodged with a labour inspector. This court exercises a supervisory jurisdiction in respect of appeals form decision made ultimately by the director-general, or arbitration award issued by the CCMA. Absent a claim in contract, this court lacks jurisdiction to enforce the provisions of the BCEA as a court of first instance. This much was established by this court as long ago as 2010, in *Mayo v Bull Brand Food (Pty) Ltd* (2010) 31 *ILJ* 951 (LC) and *Indwe Risk Services (Pty) Ltd v Hester Petronella van Zyl* (2010) 31 *ILJ* 956 (LC)

[16] In summary: the applicants' claim of an unlawful suspension is not a claim contemplated by the LRA, and neither that Act nor any other statute confers jurisdiction on this court to make a determination of the lawfulness or validity of a

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suspension. In any event, the true nature of the suspension dispute is one that concerns the application of a collective agreement, a dispute that must be arbitrated. The claim of unlawful deductions from remuneration is one that must be pursued in terms of the enforcement mechanisms of the BCEA. Given my conclusion that in respect of both legs of the applicants' claim this court lacks jurisdiction, it is not necessary for me to consider whether the applicants have been the requirements for final interdictory relief.

[17] In so far as costs are concerned, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. In matters that involve collective bargaining partners, the court is traditionally reluctant to make orders for costs on account the potential prejudice that a costs order might represent to that relationship. There is no evidence in the present instance of the existence of any collective bargaining relationship, nor is there any evidence of any prejudice that an order for costs might present. I must also necessarily take into account the absence of any cogent reason why costs should not follow the result, and that the applicants were forewarned in the answering affidavit of the jurisdictional point. The applicants have unnecessarily burdened the court with an application that extends unnecessarily to some 900 pages. The blame for this lies with the applicants. There is no conceivable reason why the papers in what is a relatively straightforward matter should be so voluminous. Perhaps the union's members will not object to their subscriptions being employed to this end, but I fail to see why the ratepayers of Johannesburg should be obliged to meet the cost of opposing an application that is unnecessarily voluminous and was misguided from the outset. The urgent court has a taxing roll, and a failure to plead a case with precision does not assist. Finally, the respondent engaged two counsel to prepare its heads of argument, but it seems fair to me given that one counsel argued the case that the costs of one counsel should be allowed.

I make the following order:

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1 The application is dismissed, with costs.

André van Niekerk

Judge

APPEARANCES

For the applicants: Mr ST Mosomane, Mosomane Inc.

For the respondent: Adv. Z Ngwenya, instructed by Bowmans Inc., heads drafted by Adv. G Fourie SC and Adv. Z Ngwenya

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